

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

EMM HOLDINGS, LLC

P.O. Box 1463
Brookfield, WI 53008

Plaintiff,

v.

SECURITIES AND EXCHANGE COMMISSION,

Station Place
100 F Street NE, Mail Stop 2736
Washington, D.C. 20549

Defendant.

COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action brought under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, to order the production of federal government agency records, concerning Quantlab Securities, that Defendant, the Securities and Exchange Commission, has in its possession and control.

JURISDICTION AND VENUE

2. This Court has subject-matter jurisdiction and venue over this action pursuant to 28 U.S.C. 1331 and 5 U.S.C. § 552(a)(4)(B).

PARTIES

3. Defendant, the Securities and Exchange Commission, is an agency of the United States and has possession and control of the sought records. Defendant has improperly withheld these documents from Plaintiff.

4. Plaintiff, EMM Holdings, LLC, is a Brookfield, Wisconsin company. Plaintiff is the requester of the records which Defendant is withholding. Through other litigation, Plaintiff believes it has uncovered

a large securities trading fraud scheme and/or a systematic use of unfair advantages (herein “malfeasance”) by those engaged in the “high frequency trading” (HFT) industry.¹ Plaintiff believes the global securities markets would be well-served by exposing malfeasance by market participants.

5. The prompt release of the information is essential. In recent years, the HFT industry has become a major force in the global financial markets while remaining impenetrable to public understanding and regulatory supervision. HFT activity constitutes somewhere between 50% to 75% of all securities trades made on the public exchanges. A handful of large HFTs are alleged to account for more than 10% of any given day’s trading volume. Importantly, the massive profits obtained by HFTs come at the expense of long-term “mom and pop” investors, pension funds, and mutual funds.

6. The combination of huge profits with highly-complex methods and technology has created a perfect storm for malfeasance: the Defendant and other regulators cannot possibly understand the HFT industry they are charged with regulating. Therefore, if there exists any evidence of malfeasance by HFT participants, this information must promptly come to light. More attention to the HFT industry will allow the entire public, including others in the financial industry, to share their knowledge, expertise, and perspective as to wrongful or questionable tactics used by HFT participants. Moreover, if the sought records uncover regulatory *inaction* then public scrutiny and pressure should come to bear on Defendant.

7. Plaintiff’s concerns about Defendant’s competence to pursue malfeasance are justified and even acknowledge by Defendant. The below is drawn from a February 2012 Washington Post article on Defendant and other regulators’ lack of ability to competently patrol the HFT industry:

At a wide-ranging question-and-answer session with reporters...Schapiro (Chairman of the SEC) said that major regulators from various countries gathered in the fall to confidentially compare notes about high-frequency trading.

“And we all concluded that we have concerns, but we don’t have enough data yet to really be able to justify significant additional steps at this point,” Schapiro said. “We need to have a much deeper understanding of the impact of high-frequency trading on our markets.”

The issue illustrates how regulators are often hard-pressed to keep up with the financial industry, especially where technology is involved.

¹ HFT is an extremely complex securities trading method that uses powerful computers to transact a large number of trade orders at very fast speeds. HFT participants use advanced and continually changing algorithms to analyze multiple market factors and execute trade orders based on these factors. Further, the trading is a purely speculative and rent-seeking act as the underlying value of a traded security is not important to an HFT participant-only correctly anticipating the direction of a security’s price movement and maintaining favored access to the market exchanges is pertinent.

David S. Hilzenrath, *High-frequency trading raises concerns at SEC*, Washington Post, February 22, 2012. Accessed online August 31, 2012 (http://www.washingtonpost.com/business/economy/high-frequency-trading-raises-concerns-at-sec/2012/02/22/gIQAfpLdTR_story.html) (emphasis added).

8. Quantlab Securities is a large HFT enterprise, having reported revenues of over \$165 million in 2010 alone. There is reason to believe they have or are engaged in some malfeasance. First, of course, are Defendant's acknowledgements that there is an on-going investigation or proceeding relating to Quantlab Securities. Second, Quantlab Securities and its related companies have been repeatedly fined for submitting faulty Order Audit Trail (OATs) records to the Financial Industry Regulatory Authority (FINRA). These records are exactly what their name describes: a paper trail that allows regulators to recreate a market participant's past actions. By repeatedly submitting faulty reports, it is plausible that Quantlab Securities was engaging in a systematic cover-up of their securities trading patterns to escape regulatory attention. The information sought by Plaintiff would corroborate the belief that Quantlab Securities engaged in market malfeasance to make enormous profits. Discovering and exposing such malfeasance is crucial to ensure confidence in the global markets. Further, the sought records will shed light on whether Defendant understands and is competently pursuing malfeasance in the HFT industry.

9. By letter dated March 12, 2012, plaintiff requested access to "records of consumer complaints, no action letters, interpretive letters, and records compiled in any and all investigations, consumer complaints, and staff comment letters in relation to Quantlab Securities that the SEC has received since January 1, 2000." A copy of this letter is attached as Exhibit 1.

10. By letter dated May 31, 2012, plaintiff was denied access to the requested information on the grounds that it was exempt from disclosure under Exemption 5 U.S.C. § 552(b)(7)(A) and 17 CFR § 200.80(b)(7)(i), as the "the release of (the sought records)... could reasonably be expected to interfere with enforcement activities." A copy of this letter is attached as Exhibit 2.

11. The Defendant did not explain its use of the law enforcement exemption in the May 31, 2012 letter. Instead, Defendant used conclusory language to justify its refusal to provide the sought records. The Defendants have the burden to demonstrate that documents were properly withheld under an applicable exemption and have not done so. Solar Sources, Inc. v. United States, 142 F.3d 1033, 1037 (7th Cir. 1998). Plaintiff is concerned that there may actually be no "on-going" investigation, but merely an unworked open file waiting for various statutes of limitations to run. Given Defendant's near complete

abdication of its prosecutorial duties during the 2008 financial crisis, inaction and delay may unfortunately have become Defendant's modus operandi for dealing with complex financial malfeasance. Discovering whether there has been a capitulation by regulators in their supervision of the HFT industry is a primary goal of Plaintiff in this matter.

12. By letter dated June 8, 2012, plaintiff appealed the denial of this request. A copy of this letter is attached as Exhibit 3. The appeal noted that the law enforcement exemption cited by Defendant is only appropriate where a law enforcement proceeding or activity would be *interfered* with. The exemption does not apply to past, closed, or stalled investigations. The only way Defendant may use this exemption *is if there is an on-going and active investigation into Quantlab Securities*.

13. By letter dated June 27, 2012, plaintiff's appeal was denied. In the letter, the Defendant's Associate General Counsel states the exemption cited was appropriate where there is a "pending investigation," "investigation prior to court proceedings," or an "affirmation that there is an active and on-going investigation." A copy of this letter is attached as Exhibit 4.

14. By an email sent on July 13, 2012 to the Office of Government Information Services (OGIS), plaintiff did request a facilitator to mediate the FOIA dispute between the Defendant and Plaintiff. *Plaintiff was attempting to avoid the instant litigation.* In a letter emailed on August 17, 2012 the OGIS staff reported that Defendant would not engage in mediation. A copy of this letter is attached as Exhibit 5.

15. Defendant has never explained the extent or nature of their search for the sought records. Defendant did release a single, brief, customer complaint to Plaintiff.

16. Plaintiff has a right of access to the requested information under 5 U.S.C. § 552(a)(3). Defendant has not provided a sufficient explanation or basis for the denial of such access. Conclusory statements do not suffice to justify refusal to release sought records.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests this Court:

- (1) Order Defendant to provide access to the requested documents;
- (2) Expedite this proceeding as provided for in 28 U.S.C. § 1657;
- (3) Award Plaintiff costs and reasonable attorneys' fees in this action, as provided in 5 U.S.C. § 552(a)(4)(E); and
- (4) Grant such other and further relief as may deem just and proper.

Dated at Milwaukee, Wisconsin, this 19th day of September 2012:

D. Morgan Adams Law, LLC

Attorney for the Plaintiff, EMM Holdings LLC

By: /s/ Daniel Morgan Adams

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